

EXHIBIT 30

1 IN THE UNITED STATES BANKRUPTCY COURT
2 FOR THE NORTHERN DISTRICT OF TEXAS
3 DALLAS DIVISION

4 In Re:) **Case No. 19-34054-s gj-11**
5) Chapter 11
6 HIGHLAND CAPITAL)
7 MANAGEMENT, L.P.,) Dallas, Texas
8 Debtor.) Monday, February 8, 2021
9) 9:00 a.m. Docket
10)
11) BENCH RULING ON CONFIRMATION
12) HEARING [1808] AND AGREED
13) MOTION TO ASSUME [1624]
14)
15)

16 TRANSCRIPT OF PROCEEDINGS
17 BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
18 UNITED STATES BANKRUPTCY JUDGE.

19 WEBEX APPEARANCES:

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25 Proceedings recorded by electronic sound recording;
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1 DALLAS, TEXAS - FEBRUARY 8, 2021 - 9:08 A.M.

2 THE COURT: Please be seated.

3 (Beeping.)

4 THE COURT: Someone needs to turn off their whatever.

5 All right. Good morning. This is Judge Jernigan, and we
6 have scheduled today a bench ruling regarding the Debtor's
7 plan that we had a confirmation trial on last week. This is
8 Highland Capital Management, LP, Case No. 19-34054.

9 Let me first make sure we've got Debtor's counsel on the
10 line. Do we have --

11 MR. POMERANTZ: Yes.

12 THE COURT: -- Mr. Pomerantz?

13 MR. POMERANTZ: Yes, Your Honor. Good morning, Your
14 Honor. Jeff Pomerantz; Pachulski Stang Ziehl & Jones; on
15 behalf of the Debtor.

16 THE COURT: Okay. Good morning. Do we have the
17 Creditors' Committee on the phone?

18 MR. CLEMENTE: Good morning, Your Honor. Matthew
19 Clemente of Sidley Austin on behalf of the Creditors'
20 Committee.

21 THE COURT: Good morning. All right. We had various
22 Objectors. Do we have Mr. Dondero's counsel on the phone?

23 MR. LYNN: Yes, Your Honor. Michael Lynn, together
24 with John Bonds and Bryan Assink, for Jim Dondero.

25 THE COURT: Good morning. For the Trusts, the

1 Dugaboy and Get Good Trusts, do we have Mr. Draper?

2 MR. DRAPER: Yes. Douglas Draper is on the line,
3 Your Honor.

4 THE COURT: Good morning. Now, for what I'll call
5 the Funds and Advisor Objectors, do we have Mr. Rukavina and
6 your crew on the line?

7 MR. RUKAVINA: Davor Rukavina. And Lee Hogewood is
8 also on the line.

9 THE COURT: All right. Good morning to you. All
10 right. And we had objections pending from the U.S. Trustee as
11 well. Do we have the U.S. Trustee on the line?

12 (No response.)

13 THE COURT: All right. If you're appearing, you're
14 on mute. We're not hearing you.

15 All right. Well, we have lots of other folks. I don't
16 mean to be neglectful of them, but we're going to get on with
17 the ruling this morning. This is going to take a while. This
18 is a complex matter, so it should take a while.

19 All right. Before the Court, of course, for consideration
20 is the Debtor's Fifth Amended Plan, first filed on November
21 24, 2020, as later modified on or around January 22, 2021,
22 with more amendments filed on or around February 1, 2021. The
23 Court will hereinafter refer to this as the "Plan."

24 The parties refer to the Plan as a monetization plan
25 because it involves the gradual wind-down of the Debtor's

1 assets and certain of its funds over time, with the
2 Reorganized Debtor continuing to manage certain other funds
3 for a while, under strict governance and monitoring, and a
4 Claimants Trust will receive the proceeds of that process,
5 with the creditors receiving an interest in that trust. There
6 is also anticipated to be Litigation Sub-Trust established for
7 the purpose of pursuing certain avoidance or other causes of
8 action for the benefit of creditors.

9 The recovery for general unsecured creditors is estimated
10 now at 71 percent.

11 The Plan was accepted by 99.8 percent of the dollar amount
12 of voting creditors in Class 8, the general unsecured class,
13 but as to numerosity, a majority of the class of general
14 unsecured creditors did not vote in favor of the plan.
15 Specifically, 27 claimants voted no and 17 claimants voted
16 yes. All but one of the rejecting ballots were cast by
17 employees who, according to the Debtor, are unlikely to have
18 allowed claims because they are asserted for bonuses or other
19 compensation that will not become due.

20 Meanwhile, in a convenience class, Class 7, of general
21 unsecured claims under one million dollars, one hundred
22 percent of the 16 claimants who chose to vote in that class
23 chose to accept the Plan.

24 Because of the rejecting votes in Class 8, and because of
25 certain objections to the Plan, the Court heard two full days

1 of evidence, considering testimony from five witnesses and
2 thousands of pages of documentary evidence, in considering
3 whether to confirm the Plan pursuant to Sections 1129(a) and
4 (b) of the Bankruptcy Code.

5 The Court finds and concludes that the Plan meets all of
6 the relevant requirements of Sections 1123, 1124, and 1129 of
7 the Code, and other applicable provisions of the Bankruptcy
8 Code, but is issuing this detailed ruling to address certain
9 pending objections to the Plan, including but not limited to
10 objections regarding certain Exculpations, Releases, Plan
11 Injunctions, and Gatekeeping Provisions of the Plan.

12 The Court reserves the right to amend or supplement this
13 oral ruling in more detailed findings of fact, conclusions of
14 law, and an Order.

15 First, by way of introduction, this case is not your
16 garden-variety Chapter 11 case. Highland Capital Management,
17 LP is a multibillion dollar global investment advisor,
18 registered with the SEC pursuant to the Investment Advisers
19 Act of 1940. It was founded in 1993 by James Dondero and Mark
20 Okada. Mr. Okada resigned from his role with Highland prior
21 to the bankruptcy case being filed. Mr. Dondero was in
22 control of the Debtor as of the day it filed bankruptcy, but
23 agreed to relinquish control of it on or about January 9,
24 2020, pursuant to an agreement reached with the Official
25 Unsecured Creditors' Committee, which will be described later.

1 Although Mr. Dondero remained on as an unpaid employee and
2 portfolio manager with the Debtor after January 9, 2020, his
3 employment with the Debtor terminated on October 9, 2020. Mr.
4 Dondero continues to work for and essentially control numerous
5 nondebtor companies in the Highland complex of companies.

6 The Debtor is headquartered in Dallas, Texas. As of the
7 October 2019 petition date, the Debtor employed approximately
8 76 employees.

9 Pursuant to various contractual arrangements, the Debtor
10 provides money management and advisory services for billions
11 of dollars of assets, including CLOs and other investments.
12 Some of these assets are managed pursuant to shared services
13 agreements with a variety of affiliated entities, including
14 other affiliated registered investment advisors. In fact,
15 there are approximately 2,000 entities in the Byzantine
16 complex of companies under the Highland umbrella.

17 None of these affiliates of Highland filed for Chapter 11
18 protection. Most, but not all, of these entities are not
19 subsidiaries, direct or indirect, of Highland. And certain
20 parties in the case preferred not to use the term "affiliates"
21 when referring to them. Thus, the Court will frequently refer
22 loosely to the so-called, in air quotes, "Highland complex of
23 companies" when referring to the Highland enterprise. That's
24 a term many of the lawyers in the case use.

25 Many of the companies are offshore entities, organized in

1 such faraway jurisdictions as the Cayman Islands and Guernsey.

2 The Debtor is privately owned 99.5 percent by an entity
3 called Hunter Mountain Investment Trust; 0.1866 percent by the
4 Dugaboy Investment Trust, a trust created to manage the assets
5 of Mr. Dondero and his family; 0.0627 percent by Mark Okada,
6 personally and through family trusts; and 0.25 percent by
7 Strand Advisors, Inc., the general partner.

8 The Debtor's primary means of generating revenue has
9 historically been from fees collected for the management and
10 advisory services provided to funds that it manages, plus fees
11 generated for services provided to its affiliates.

12 For additional liquidity, the Debtor, prior to the
13 petition date, would sell liquid securities in the ordinary
14 course, primarily through a brokerage account at Jefferies,
15 LLC. The Debtor would also, from time to time, sell assets at
16 nondebtor subsidiaries and distribute those proceeds to the
17 Debtor in the ordinary course of business.

18 The Debtor's current CEO, James Seery, credibly testified
19 that the Debtor was "run at a deficit for a long time and
20 then would sell assets or defer employee compensation to cover
21 its deficits." This Court cannot help but wonder if that was
22 necessitated because of enormous litigation fees and expenses
23 that Highland was constantly incurring due to its culture of
24 litigation, as further addressed hereafter.

25 Highland and this case are not garden-variety for so many

1 reasons. One is the creditor constituency. Highland did not
2 file bankruptcy because of some of the typical reasons a large
3 company files Chapter 11. For example, it did not have a
4 large asset-based secured lender with whom it was in default.
5 It only had relatively insignificant secured indebtedness
6 owing to Jefferies, with whom it had a brokerage account, and
7 one other entity called Frontier State Bank.

8 Highland did not have problems with trade vendors or
9 landlords. It did not suffer any type of catastrophic
10 business calamity. In fact, it filed Chapter 11 six months
11 before the COVID-19 pandemic was declared. The Debtor filed
12 Chapter 11 due to a myriad of massive unrelated business
13 litigation claims that it was facing, many of which had
14 finally become liquidated or were about to become liquidated
15 after a decade or more of contentious litigation in multiple
16 fora all over the world.

17 The Unsecured Creditors' Committee in this case has
18 referred to the Debtor under its former chief executive, Mr.
19 Dondero, as a serial litigator. This Court agrees with that
20 description. By way of example, the members of the Creditors'
21 Committee and their history of litigation with the Debtor and
22 others in the Highland complex are as follows:

23 First, the Redeemer Committee of the Highland Crusader
24 Fund, which I'll call the Redeemer Committee. This Creditors'
25 Committee member obtained an arbitration award against the

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1 Debtor of more than \$190 million, inclusive of interest,
2 approximately five months before the petition date from a
3 panel of the American Arbitration Association. It was on the
4 verge of having that award confirmed by the Delaware Chancery
5 Court immediately prior to the petition date, after years of
6 disputes that started in late 2008 and included legal
7 proceedings in Bermuda. This creditor's claim was settled
8 during the bankruptcy case in the amount of approximately
9 \$137.7 million. The Court is omitting various details and
10 aspects of that settlement.

11 The second Creditors' Committee member, Acis Capital
12 Management, LP, which was formerly in the Highland complex of
13 companies but was not affiliated with Highland as of the
14 petition date. This UCC member and its now-owner, Josh Terry,
15 were involved in litigation with Highland dating back to 2016.
16 Acis was forced into an involuntary bankruptcy in the
17 Bankruptcy Court for the Northern District of Texas, Dallas
18 Division, by Josh Terry, who was a former Highland portfolio
19 manager, in 2018 after Josh Terry obtained an approximately \$8
20 million arbitration award and judgment against Acis that was
21 issued by a state court in Dallas County, Texas. Josh Terry
22 was ultimately awarded the equity ownership of Acis by the
23 Dallas Bankruptcy Court in the Acis bankruptcy case.

24 Acis subsequently asserted a multimillion dollar claim
25 against Highland in the Dallas Bankruptcy Court for Highland's

1 alleged denuding of Acis in fraud of its creditors, primarily
2 Josh Terry.

3 The litigation involving Acis and Mr. Terry dates back to
4 mid-2016, and has continued on, with numerous appeals of
5 bankruptcy court orders, including one appeal still pending at
6 the United States Court of Appeals for the Fifth Circuit.

7 There was also litigation involving Josh Terry and Acis in
8 the Royal Court of the Island of Guernsey and in a court in
9 New York.

10 The Acis claim was settled during this bankruptcy case in
11 court-ordered mediation for approximately \$23 million. Other
12 aspects and details of this settlement are being omitted.

13 Now, the third Creditors' Committee member, UBS
14 Securities. It's a creditor who filed a proof of claim in the
15 amount of \$1,039,000,000 in the Highland case. Yes, over one
16 billion dollars. The UBS claim was based on the amount of a
17 judgment that UBS received from a New York state court in 2020
18 after a multi-week bench trial which had occurred many months
19 earlier on a breach of contract claim against other entities
20 in the Highland complex. UBS alleged that the Debtor should
21 be liable for the judgment. The UBS litigation related to
22 activities that occurred in 2008. The litigation involving
23 UBS and Highland and its affiliates was pending for more than
24 a decade, there having been numerous interlocutory appeals
25 during its history.

1 The Debtor and UBS recently announced a settlement of the
2 UBS claim, which came a few months after court-ordered
3 mediation. The settlement is in the amount of \$50 million as
4 a general unsecured claim, \$25 million as a subordinated
5 claim, and \$18 million of cash coming from a nondebtor entity
6 in the Highland complex known as Multistrat. Other aspects of
7 this settlement are being omitted.

8 The fourth and last Creditors' Committee member is Meta-e
9 Discovery. It is a vendor who happened to supply litigation
10 and discovery-related services to the Debtor over the years.
11 It had unpaid invoices on the petition date of more than
12 \$779,000.

13 It is fair to say that the members of the Creditors'
14 Committee in this case all have wills of steel. They fought
15 hard before and during the bankruptcy case. The members of
16 the Creditors' Committee are highly sophisticated and have had
17 highly sophisticated professionals representing them. They
18 have represented their constituency in this case as
19 fiduciaries extremely well.

20 In addition to these Creditors Committee members, who were
21 all embroiled in years of litigation with Highland and its
22 affiliates in various ways, the Debtor has been in litigation
23 with Patrick Daugherty, a former limited partner and employee
24 of Highland, for many years in both Delaware and Texas state
25 courts. Patrick Daugherty filed a proof of claim for "at

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1 least \$37.4 million" relating to alleged breached employment-
2 related agreements and for the tort of defamation arising from
3 a 2017 press release posted by the Debtor.

4 The Debtor and Patrick Daugherty recently announced a
5 settlement of the Patrick Daugherty claim in the amount of
6 \$750,000 cash on the effective date, an \$8.25 million general
7 unsecured claim, and a \$2.75 million subordinated claim.

8 Other aspects and details of this settlement are being
9 omitted.

10 Additionally, an entity known as HarbourVest, who invested
11 more than \$70 million with an entity in the Highland complex,
12 asserted a \$300 million proof of claim against Highland,
13 alleging, among other things, fraud and RICO violations. The
14 HarbourVest claim was settled during the bankruptcy case for a
15 \$45 million general unsecured claim and a \$35 million junior
16 claim.

17 Other than these claims just described, most of the other
18 claims in this case are claims asserted against the Debtor by
19 other entities in the Highland complex, most of which entities
20 the Court finds to be controlled by Mr. Dondero; claims of
21 employees who believe that they are entitled to large bonuses
22 or other types of deferred compensation; and claims of
23 numerous law firms that did work for Highland and were unpaid
24 for amounts due to them on the petition date.

25 Yet another reason this is not your garden-variety Chapter

1 11 case is its postpetition corporate governance structure.
2 Highland filed bankruptcy October 16, 2019. Contentiousness
3 with the Creditors' Committee began immediately, with first
4 the Committee's request for a change of venue from Delaware to
5 Dallas, and then a desire by the Committee and the U.S.
6 Trustee for a Chapter 11 or 7 trustee to be appointed due to
7 concerns over and distrust of Mr. Dondero and his numerous
8 conflicts of interest and alleged mismanagement or worse.

9 After many weeks of the threat of a trustee lingering, the
10 Debtor and the Creditors' Committee negotiated and the Court
11 approved a corporate governance settlement on January 9, 2020
12 that resulted in Mr. Dondero no longer being an officer or
13 director of the Debtor or of its general partner, Strand.

14 As part of the court-approved settlement, three eminently-
15 qualified Independent Directors were chosen by the Creditors'
16 Committee and engaged to lead Highland through its Chapter 11
17 case. They were James Seery, John Dubel, and Retired
18 Bankruptcy Judge Russell Nelms. They were technically the
19 Independent Directors of Strand, the general partner of the
20 Debtor. Mr. Dondero had previously been the sole director of
21 Strand, and thus the sole person in ultimate control of the
22 Debtor.

23 The three independent board members' resumes are in
24 evidence. James Seery eventually was named CEO of the Debtor.
25 Suffice it to say that this changed the entire trajectory of

1 the case. This saved the Debtor from a trustee. The Court
2 trusted the new directors. The Creditors' Committee trusted
3 them. They were the right solution at the right time.

4 Because of the unique character of the Debtor's business,
5 the Court believed this solution was far better than a
6 conventional Chapter 7 or 11 trustee. Mr. Seery, in
7 particular, knew and had vast experience at prominent firms
8 with high-yield and distressed investing similar to the
9 Debtor's business. Mr. Dubel had 40 years of experience
10 restructuring large, complex businesses and serving on their
11 boards of directors in this context. And Retired Judge Nelms
12 had not only vast bankruptcy experience but seemed
13 particularly well-suited to help the Debtor maneuver through
14 conflicts and ethical quandaries.

15 By way of comparison, in the Chapter 11 case of Acis, the
16 former affiliate of Highland that this Court presided over two
17 or three years ago, which company was much smaller in size and
18 scope than Highland, managing only five or six CLOs, a Chapter
19 11 trustee was elected by the creditors that was not on the
20 normal rotation panel for trustees in this district, but
21 rather was a nationally-known bankruptcy attorney with more
22 than 45 years of large Chapter 11 case experience. This
23 Chapter 11 trustee performed valiantly, but was sued by
24 entities in the Highland complex shortly after he was
25 appointed, which this Court had to address. The Acis trustee

1 could not get Highland and its affiliates to agree to any
2 actions taken in the case, and he finally obtained
3 confirmation of a plan over Highland and its affiliates'
4 objections in his fourth attempted plan, which confirmation
5 then was promptly appealed by Highland and its affiliates.

6 Suffice it to say it was not easy to get such highly-
7 qualified persons to serve as independent board members and
8 CEO of this Debtor. They were stepping into a morass of
9 problems. Naturally, they were worried about getting sued, no
10 matter how defensible their efforts might be, given the
11 litigation culture that enveloped Highland historically. It
12 seemed as though everything always ended in litigation at
13 Highland.

14 The Court heard credible testimony that none of them would
15 have taken on the role of Independent Director without a good
16 D&O insurance policy protecting them, without indemnification
17 from Strand, guaranteed by the Debtor; without exculpation for
18 mere negligence claims; and without a gatekeeper provision,
19 such that the Independent Directors could not be sued without
20 the bankruptcy court, as a gatekeeper, giving a potential
21 plaintiff permission to sue.

22 With regard to the gatekeeper provision, this was
23 precisely analogous to what bankruptcy trustees have pursuant
24 to the so-called "Barton Doctrine," which was first
25 articulated in an old U.S. Supreme Court case.

1 The Bankruptcy Court approved all of these protections in
2 a January 9, 2020 order. No one appealed that order. And Mr.
3 Dondero signed the settlement agreement that was approved by
4 that order.

5 An interesting fact about the D&O policy came out in
6 credible testimony at the confirmation hearing. Mr. Dubel and
7 an insurance broker from Aon, named Marc Tauber, both credibly
8 testified that the gatekeeper provision was needed because of
9 the so-called, and I quote, "Dondero Exclusion" in the
10 insurance marketplace.

11 Specifically, the D&O insurers in the marketplace did not
12 want to cover litigation claims that might be brought against
13 the Independent Directors by Mr. Dondero because the
14 marketplace of D&O insurers are aware of Mr. Dondero's
15 litigiousness. The insurers would not have issued a D&O
16 policy to the Independent Directors without either the
17 gatekeeping provision or a "Dondero Exclusion" being in the
18 policy.

19 Thus, the gatekeeper provision was part of the January 9,
20 2020 settlement. There was a sound business justification for
21 it. It was reasonable and necessary. It was consistent with
22 the Barton Doctrine in an extremely analogous situation --
23 i.e., the independent board members were analogous to a three-
24 headed trustee in this case, if you will. Mr. Dondero signed
25 off on it. And, again, no one ever appealed the order

1 approving it.

2 The Court finds that, like the Creditors' Committee, the
3 independent board members here have been resilient and
4 unwavering in their efforts to get the enormous problems in
5 this case solved. They seem to have at all times negotiated
6 hard and with good faith. As noted previously, they changed
7 the entire trajectory of this case.

8 Still another reason why this was not your garden-variety
9 case was the mediation effort. In summer of 2020, roughly
10 nine months into the Chapter 11 case, this Court ordered
11 mediation among the Debtor, Acis, UBS, the Redeemer Committee,
12 and Mr. Dondero. The Court selected co-mediators, since this
13 seemed like such a Herculean task, especially during COVID-19,
14 where people could not all be in the same room. Those co-
15 mediators were Retired Bankruptcy Judge Allan Gropper from the
16 Southern District of New York, who had a distinguished career
17 presiding over complex Chapter 11 cases, and Ms. Sylvia Mayer,
18 who likewise has had a distinguished career, first as a
19 partner in a preeminent law firm working on complex Chapter 11
20 cases, and subsequently as a mediator and arbitrator in
21 Houston, Texas.

22 As noted earlier, the Acis claim was settled during the
23 mediation, which seemed nothing short of a miracle to this
24 Court, and the UBS claim was settled many months later, and
25 this Court believes the groundwork for that ultimate

1 settlement was laid, or at least helped, through the
2 mediation. And as earlier noted, other enormous claims have
3 been settled during this case, including that of the Redeemer
4 Committee, who, again, had asserted approximately or close to
5 a \$200 million claim; HarbourVest, who asserted a \$300 million
6 claim; and Patrick Daugherty, who asserted close to a \$40
7 million claim.

8 This Court cannot stress strongly enough that the
9 resolution of these enormous claims and the acceptance of all
10 of these creditors of the Plan that is now before the Court
11 seems nothing short of a miracle. It was more than a year in
12 the making.

13 Finally, a word about the current remaining Objectors to
14 the Plan before the Court. Once again, the Court will use the
15 phrase "not garden-variety." Originally, there were over one
16 dozen objections filed to this Plan. The Debtor has made
17 various amendments or modifications to the Plan to address
18 some of these objections. The Court finds that none of these
19 modifications require further solicitation, pursuant to
20 Sections 1125, 1126, 1127 of the Code, or Bankruptcy Rule
21 3019, because, among other things, they do not materially
22 adversely change the treatment of the claims of any creditor
23 or interest holder who has not accepted in writing the
24 modifications.

25 Among other things, there were changes to the projections

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1 that the Debtor filed shortly before the confirmation hearing
2 that, among other things, show the estimated distribution to
3 creditors and compare plan treatment to a likely disbursement
4 in a Chapter 7.

5 These do not constitute a materially adverse change to the
6 treatment of any creditors or interest holders. They merely
7 update likely distributions based on claims that have now been
8 settled, and they've otherwise incorporated more recent
9 financial data. This happens often before confirmation
10 hearings. The Court finds that it did not mislead or
11 prejudice any creditors or interest holders, and certainly
12 there was no need to resolicit the Plan.

13 The only Objectors to the Plan left at this time were Mr.
14 Dondero and entities that the Court finds are controlled by
15 him. The standing of these entities to object to the Plan
16 exists, but the remoteness of their economic interest is
17 noteworthy, and the Court questions the good faith of the
18 Objectors. In fact, the Court has good reason to believe that
19 these parties are not objecting to protect economic interests
20 they have in the Debtor, but to be disruptors.

21 Mr. Dondero wants his company back. This is
22 understandable. But it's not a good faith basis to lob
23 objections to the Plan. The Court has slowed down
24 confirmation multiple times on the current Plan and urged the
25 parties to talk to Mr. Dondero. The parties represent that

1 they have, and the Court believes that they have.

2 Now, to be specific about the remoteness of the objectors'
3 interests, the Court will address them each separately.

4 First, Mr. Dondero has a pending objection. Mr. Dondero's
5 only economic interest with regard to the Debtor at this point
6 is an unliquidated indemnification claim. And based on
7 everything this Court has heard, his indemnification claim
8 will be highly questionable at this juncture.

9 Second, a joint objection has been filed by the Dugaboy
10 Trust and the Get Good Trust. As for the Dugaboy Trust, it
11 was created to manage the assets of Mr. Dondero and his
12 family, and it owns a 0.1866 percent limited partnership
13 interest in the Debtor. The Court is not clear what economic
14 interest the Get Good Trust has, but it likewise seems to be
15 related to Mr. Dondero, and it has been represented to the
16 Court numerous times that the trustee is Mr. Dondero's college
17 roommate.

18 Another group of Objectors that has joined together in one
19 objection is what the Court will refer to as the Highland and
20 NexPoint Advisors and Funds. The Court understands they
21 assert disputed administrative expense claims against the
22 estate. While the evidence presented was that they have
23 independent board members that run these companies, the Court
24 was not convinced of their independence from Mr. Dondero.
25 None of the so-called independent board members of these

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1 entities have ever testified before the Court. Moreover, they
2 have all been engaged with the Highland complex for many
3 years.

4 The witness who testified on these Objectors' behalves at
5 confirmation, Mr. Jason Post, their chief compliance officer,
6 resigned from Highland after more than twelve years in October
7 2020, at the same time that Mr. Dondero resigned or was
8 terminated by Highland. And a prior witness recently for
9 these entities whose testimony was made part of the record at
10 the confirmation hearing essentially testified that Mr.
11 Dondero controlled these entities.

12 Finally, various NexBank entities objected to the Plan.
13 The Court does not believe they have liquidated claims. Mr.
14 Dondero appears to be in control of these entities as well.

15 To be clear, the Court has allowed all of these objectors
16 to fully present arguments and evidence in opposition to
17 confirmation, even though their economic interests in the
18 Debtor appear to be extremely remote and the Court questions
19 their good faith. Specifically on that latter point, the
20 Court considers them all to be marching pursuant to the orders
21 of Mr. Dondero.

22 In the recent past, Mr. Dondero has been subject to a TRO
23 and preliminary injunction by the Bankruptcy Court for
24 interfering with the current CEO's management of the Debtor in
25 specific ways that were supported by evidence. Around the

1 time that this all came to light and the Court began setting
2 hearings on the alleged interference, Mr. Dondero's company
3 phone supplied to him by Highland, which he had been asked to
4 turn in, mysteriously went missing. The Court merely mentions
5 this in this context as one of many reasons that the Court has
6 to question the good faith of Mr. Dondero and his affiliated
7 objectors.

8 The only other pending objection besides these objections
9 of the Dondero and Dondero-controlled entities is an objection
10 of the United States Trustee pertaining to the release,
11 exculpation, and injunction provisions in the Plan.

12 In juxtaposition to these pending objections, the Court
13 notes that the Debtor has resolved earlier-filed objections to
14 the Plan filed by the IRS, Patrick Daugherty, CLO Holdco,
15 Ltd., numerous local taxing authorities, and certain current
16 and former senior-level employees of the Debtor.

17 With that rather detailed factual background addressed,
18 because certainly context matters here, the Court now
19 addresses what it considers the only serious objections raised
20 in connection with confirmation. Specifically, the Plan
21 contain certain releases, exculpation, plan injunctions, and a
22 gatekeeper provision which are obviously not fully consensual,
23 since there are objections. Certainly, these provisions are
24 mostly consensual when you consider that parties with hundreds
25 of millions of dollars' worth of legitimate claims have not

1 objected to them.

2 First, a word about plan releases generally, since the
3 Objectors at times seem to gloss over, in this Court's view,
4 relevant distinctions, and seem to refer to the plan releases
5 in this Plan and the exculpations and the plan injunctions all
6 as impermissible third-party releases, when, in fact, they are
7 not, *per se*.

8 It has, without a doubt, become quite commonplace in
9 complex Chapter 11 bankruptcy cases to have three categories
10 of releases in plans. These three types are as follows.

11 First, Debtor Releases. A debtor release involves a
12 release by the debtor and its bankruptcy estate of claims
13 against nondebtor third-parties. For example, a release may
14 be granted in favor of creditors, directors, officers,
15 employees, professionals who participated in the bankruptcy
16 process. This is the least-controversial type of release
17 because the debtor is extinguishing its own claims, which are
18 property of the estate, that a debtor has authority to utilize
19 or not, pursuant to Sections 541 and 363 of the Bankruptcy
20 Code.

21 Authority for a debtor release pursuant to a plan arises
22 out of Section 1123(b)(3)(A), which indicates that a plan may
23 provide for "the settlement or adjustment of any claim or
24 interest belonging to the debtor or to the estate."

25 In this context, it would appear that the only analysis

25

1 required is to determine whether the release or settlement of
2 the claim is an exercise of reasonable business judgment on
3 that part of the debtor, is it fair and equitable, is it in
4 the best interest of the estate, given all the relevant facts
5 and circumstances? Also relevant is whether there's
6 consideration given of some sort by the releasees.

7 Now, the second type of very commonplace Chapter 11 plan
8 release is an exculpation. Chapter 11 plans also very often
9 have these exculpation provisions, and they're something much
10 narrower in scope and time than a full-fledged release. An
11 exculpation provision is more like a shield for a certain
12 subset of key actors in the case for their acts during and in
13 connection with the case, which acts may have been merely
14 negligent.

15 Specifically, a plan may absolve certain actors -- usually
16 estate fiduciaries -- such as an Official Unsecured Creditors'
17 Committee and its members, Committee professionals, sometimes
18 Debtor professionals, senior management, officers and
19 directors of the Debtor, from any liability for postpetition
20 negligent conduct -- *i.e.*, conduct which occurred during the
21 administration of the Chapter 11 case and in the negotiation,
22 drafting, and implementation of a plan. An exculpation
23 provision typically excludes gross negligence and willful
24 misconduct. It is usually worded in a passive voice, so it
25 may seem a little unclear as to whether it is actually a

1 release and by whom.

2 In any event, the rationale is that parties who actively
3 participate in a court-approved process -- often, court-
4 approved transactions by court order -- should receive
5 protection for their work. Otherwise, who would want to work
6 in such a messy, contentious situation, only to be sued for
7 alleged negligence for less-than-perfect end results?

8 Chapter 11 end results are not always pretty. One could
9 argue that these exculpation provisions, though, are much ado
10 about nothing. Why? For one thing, again, the shield is only
11 as to negligent conduct. There is no shield for other
12 problematic conduct, such as gross negligence or willful
13 misconduct.

14 Second, in many situations, any claims or causes of action
15 that might arise will belong to the Debtor or its estate.
16 Thus, they would already be released pursuant to a debtor
17 release.

18 Additionally, there is case law stating that, where a
19 claim is brought against an estate professional whose fees
20 have already been approved in a final fee application, any
21 claims are barred by *res judicata*. Thus, exculpated
22 professionals would only have potential exposure for a very
23 short window of time, until final fee applications.

24 Additionally, certain case law in Texas makes clear that
25 an attorney generally does not owe any duties to persons other

1 than his own client.

2 All of this suggests that the shield of a typical
3 exculpation provision may rarely become useful or needed.

4 Moving now to the third type of release, a true third-
5 party release, Chapter 11 plans also sometimes contain third-
6 party releases. A true third-party release involves the
7 release of claims held by nondebtor third parties against
8 other nondebtor third parties, and there is often no
9 limitation on the scope and time of the claims released.

10 This is the most heavily scrutinized of the three types of
11 plan releases. Much of the case authority focuses on whether
12 a third-party release is consensual or not in analyzing their
13 propriety and/or enforceability.

14 In Highland, there are no third-party releases. Rather,
15 there are debtor releases and exculpations. There also happen
16 to be plan injunctions and gatekeeper provisions that have
17 been challenged. The Objectors argue that these provisions
18 violate the Fifth Circuit's opinion in *Pacific Lumber* or are
19 otherwise beyond the jurisdiction or authority of the
20 bankruptcy court. These arguments are now addressed.

21 First, the debtor release is found at Article IX.D of the
22 Plan. The language, in pertinent part, reads as follows. "On
23 and after the effective date, each Released Party is deemed to
24 be hereby conclusively, absolutely, unconditionally,
25 irrevocably, and forever released and discharged by the Debtor

1 and the Estate, in each case on behalf of themselves and their
2 respective successors, assigns, and representatives, including
3 but not limited to the Claimant Trust and the Litigation Sub-
4 Trust, from any and all causes of action, including any
5 derivative claims, asserted on behalf of the Debtor, whether
6 known or unknown, foreseen or unforeseen, matured or
7 unmatured, existing or hereafter arising, in law, equity,
8 contract, tort, or otherwise, that the Debtor or the Estate
9 would have been legally entitled to assert in their own right,
10 whether individually or collectively, or on behalf of the
11 holder of any claim against, or interest in, a debtor or other
12 person."

13 There are certain exceptions discussed, and then Released
14 Parties are defined at Definition 113 of the Plan collectively
15 as: the Independent Directors; Strand, solely from the date
16 of the appointment of the Independent Directors through the
17 effective date; the CEO/CRO; the Committee, the members of the
18 Committee, in their official capacities; the professionals
19 retained by the Debtor and the Committee in the Chapter 11
20 case; and the employees. This is a defined term in the Plan
21 Supplement and does not include certain employees.

22 To be clear, these are not third-party releases such as
23 addressed in the *Pacific Lumber* case. These are the Debtor's
24 and/or the bankruptcy estate's causes of action that are
25 proposed to be released. Releases by a debtor are

1 discretionary and can be provided by a debtor to persons who
2 have provided consideration to the debtor and the estate.

3 Section 1123(b) (3) (A) of the Bankruptcy Code permits this.

4 The evidence here supported the notion that these releases
5 are a *quid pro quo* for the Released Parties' significant
6 contributions to a highly complex and contentious
7 restructuring. The Debtor is releasing its own claims. Some
8 of the Released Parties would have indemnification rights
9 against the Debtor. And the Debtor's CEO, James Seery,
10 credibly testified that he does not believe any claims exist
11 as to the Released Parties. The Court approves the Debtor
12 releases and overrules the objections to them.

13 Next, the exculpations appear at Article IX.C of the Plan
14 and provide as follows: Subject in all respects to Article
15 XII.D of the Plan, to the maximum extent permitted by
16 applicable law, no Exculpated Party will have or incur, and
17 each Exculpated Party is hereby exculpated from, any claim,
18 obligation, suit, judgment, damage, demand, debt, right, cause
19 of action, remedy, loss, and liability for conduct occurring
20 on or after the petition date in connection with or arising
21 out of the filing and administration of the Chapter 11 case,
22 the negotiation and pursuit of a disclosure statement, the
23 Plan, or the solicitation of votes for or confirmation of the
24 Plan, the funding or consummation of the Plan, or any related
25 agreements, instruments, et cetera, et cetera, whether or not

1 such Plan distributions occur following the effective date,
2 the implementation of the Plan, and any negotiation,
3 transactions, and documentation in connection with the
4 foregoing clauses, provided, however, the foregoing will not
5 apply to any acts or omissions of any Exculpated Party arising
6 out of or related to acts or omissions that constitute bad
7 faith, fraud, gross negligence, criminal misconduct, or
8 willful misconduct; or Strand or any employee other than with
9 respect to actions taken by such entities from the date of
10 appointment of the Independent Directors through the effective
11 date.

12 Exculpated Parties are later defined at Section -- or,
13 earlier defined at Section 62 of the Plan, Definition No. 62
14 of the Plan, as later limited by the Debtor, as announced in
15 the confirmation hearing. And so these are the Exculpated
16 Parties: the Debtor and its successors and assigns; the
17 employees, certain employees, as defined; Strand; the
18 Independent Directors; the Committee, the members of the
19 Committee, in their official capacities; the professionals
20 retained by the Debtor and the Committee in the Chapter 11
21 case; the CEO and CRO; and the related persons as to each of
22 these parties listed in Part (iv) through (viii) above;
23 provided, for the avoidance of doubt, and it goes on to say
24 Dondero, Mark Okada, and various others aren't Exculpated
25 Parties.

1 Now, as earlier mentioned, the Objectors argue that
2 *Pacific Lumber*, 584 F.3d 229, a Fifth Circuit case from 2009,
3 categorically rejects the permissibility of nonconsensual
4 exculpations as well as third-party releases in a Chapter 11
5 plan. So the Court is going to take a deep dive into that
6 assertion.

7 In *Pacific Lumber*, the Fifth Circuit reviewed on appeal
8 numerous challenges to a confirmed plan of affiliated debtors
9 known as Palco and Scopac and four subsidiaries. The debtor
10 Palco owned and operated the sawmill, a power plant, and even
11 a town called Scotia, California. The debtor Scopac owned
12 timberlands. A creditor, a secured creditor called Marathon
13 had a claim against Palco's assets. Marathon estimated
14 Palco's assets were worth \$110 million. Its claim was \$160
15 million. Meanwhile, other parties had large secured claims
16 against the other debtor, Scopac.

17 The plan that the bankruptcy court confirmed, which was on
18 appeal to the Fifth Circuit, was filed by both the secured
19 creditor Marathon and a joint plan proponent called MRC. MRC
20 was a competitor of the debtor Palco. The Marathon/MRC plan
21 proposed to dissolve all the debtors, cancel intercompany
22 debts, and create two new entities, Townco and Newco. Almost
23 all of the debtor Palco's assets, including the town of
24 Scotia, California, would be transferred to Townco. The
25 timberlands and other assets, including the sawmill, would be

1 placed in Newco.

2 Marathon and MRC proposed to contribute \$580 million to
3 Newco to pay claims against Scopac. And Marathon would
4 convert its secured claim against Palco's assets into equity,
5 giving it full ownership of Townco, a 15 percent stake in
6 Newco, and a new note for the sawmill's working capital. MRC
7 would own the other 80 percent of Newco and would manage and
8 run the company.

9 An indenture trustee for the secured indebtedness against
10 Scopac -- which, by the way, had also been a plan proponent of
11 a competing plan -- appealed the confirmation order, raising
12 eight distinct issues on appeal. One of the eight issues
13 pertained to what the Fifth Circuit referred to as a
14 "nondebtor exculpation and release clause." This issue is
15 discussed on the last two pages of a very lengthy opinion.

16 While the complained-of provision is not quoted verbatim
17 in the *Pacific Lumber* opinion, it appears to have been a
18 typical exculpation clause. Not a third-party release; a
19 typical exculpation clause. The Fifth Circuit stated, "The
20 plan releases MRC, Marathon, Newco, Townco, and the Unsecured
21 Creditors' Committee, and their personnel, from liability,
22 other than for willful and gross negligence related to
23 proposing, implementing, and administering the plan" at Page
24 251.

25 The Fifth Circuit held that "the nondebtor releases must

1 be struck except with respect to the Creditors' Committee and
2 its members."

3 Footnote 26 of the opinion also states that the appellants
4 had "not briefed why Newco and Townco or their officers and
5 directors should not be released," and so "we do not analyze
6 their position." Rather, the Fifth Circuit merely analyzed
7 why the exculpation provision was not permissible as to the
8 two plan proponents, MRC and Marathon.

9 Thus, the Court views *Pacific Lumber* as being a holding
10 that squarely addressed the propriety of two plan proponents,
11 a secured lender and a third-party competitor purchaser of the
12 Debtors, obtaining nonconsensual exculpation in the plan.
13 However, its reasoning certainly cannot be ignored, strongly
14 suggesting it would not be inclined to approve an exculpation
15 for any party other than a Creditors' Committee or its
16 members.

17 As far as the Fifth Circuit's reasoning, it relied on
18 Bankruptcy Code Section 524(e) for striking down the
19 exculpations, stating, "The law states, however, that
20 discharge of a debt of the debtor does not affect the
21 liability of any other entity on such debt." Page 251. The
22 opinion suggests that MRC and Marathon may have tried to argue
23 that 524(e) did not apply to their exculpations because MRC
24 and Marathon were not liable as co-obligors in any way on any
25 of the debtor's debt.

1 The Fifth Circuit seemed dismissive of this argument,
2 stating as follows, "MRC/Marathon insist the release clause is
3 part of their bargain because, without the clause, neither
4 company would have been willing to provide the plan's
5 financing. Nothing in the records suggests that MRC/Marathon,
6 the Committee, or the Debtor's officers and directors were co-
7 liable for the Debtor's prepetition debts. Instead, the
8 bargain the proponents claim to have purchased is exculpation
9 from any negligence that occurred during the course of the
10 case. Any costs the released parties might incur defending
11 against suits alleging such negligence are unlikely to swamp
12 either of these parties or the consummated reorganization. We
13 see little equitable about protecting the released nondebtors
14 from negligence suits arising out of the reorganization."

15 The Court goes on to note that, in a variety of cases,
16 that releases have been approved, but these cases "seem
17 broadly to foreclose nonconsensual nondebtor releases and
18 permanent injunctions."

19 The Court then adds at Footnote 27 that the Fifth Circuit
20 in the past did not set aside challenged plan releases that
21 were in final nonappealable orders and were the subject of
22 collateral attack much later, citing its famous *Republic*
23 *Supply v. Shoaf* case, where the Fifth Circuit ruled that *res*
24 *judicata* barred a debtor from bringing a claim that was
25 specifically and expressly released by a confirmed

1 reorganization plan because the debtor -- the objector failed
2 to object to the release at confirmation.

3 The Fifth Circuit in *Pacific Lumber* also noted that the
4 Bankruptcy Code permits bankruptcy courts to enjoin third-
5 party asbestos claims under certain circumstances, 524(g),
6 which the Court said suggests nondebtor releases are most
7 appropriate as a method to channel mass tort claims towards a
8 specific pool of assets, citing numerous cases, including
9 *Johns-Manville*.

10 In reach its holding, the Fifth Circuit saw no reason to
11 uphold exculpation to the plan proponents MRC and Marathon,
12 seeming to find it inconsistent with 524(e) under the facts at
13 bar, but the Court did uphold exculpation for the Creditors'
14 Committee and its members, stating, "We agree, however, with
15 courts that have held that 1103(c) under the Code, which lists
16 the Creditors' Committee's powers, implies Committee members
17 have qualified immunity for actions within the scope of their
18 duties." Numerous cites. "The Creditors' Committee and its
19 members are the only disinterested volunteers among the
20 parties sought to be released here. The scope of protection,
21 which does not insulate them from willful and gross
22 negligence, is adequate."

23 Thus, the Court held that the exculpation provisions in
24 *Pacific Lumber* must be struck except with regard to the
25 Creditors' Committee and its members.

1 Now, after all of that, this Court believes the following
2 can be gleaned from *Pacific Lumber*. First, the Fifth Circuit
3 hinted that consensual exculpations and/or consensual
4 nondebtor third-party releases are permissible. The Court
5 was, of course, dealing with nonconsensual exculpations in
6 *Pacific Lumber*. In this regard, I note Page 252, where the
7 Court cited various prior Fifth Circuit authority and then
8 stated, "These cases seem broadly to foreclose nonconsensual
9 nondebtor releases and permanent injunctions."

10 The second thing that can be gleaned from *Pacific Lumber*:
11 The Fifth Circuit hinted that nondebtor releases may be
12 permissible in cases involving global settlements of mass
13 claims against the debtors and co-liable parties. The Court,
14 of course, referred to 524(g), but various other cases which
15 approved nondebtor releases where mass claims were channeled
16 to a specific pool of assets.

17 Third, the Fifth Circuit outright held that exculpations
18 from negligence for a Creditors' Committee and its members are
19 permissible because the concept is both consistent with
20 1103(c), "which implies Committee members have qualified
21 immunity for actions within the scope of their duties," and a
22 good policy result, since "if members of the Committee can be
23 sued by persons unhappy with the outcome of the case, it will
24 be extremely difficult to find members to serve on an official
25 committee."

1 Fourth, the Fifth Circuit recognized in *Pacific Lumber*
2 that *res judicata* may bar complaints regarding an
3 impermissible plan release, citing to its earlier *Republic*
4 *Supply v. Shoaf* opinion.

5 Now, being ever-mindful of the Fifth Circuit's words in
6 *Pacific Lumber*, this Court cannot help but wonder about at
7 least three things.

8 First, did the Fifth Circuit leave open the door that
9 facts/equities might sometimes justify approval of an
10 exculpation for a person other than a Creditors' Committee and
11 its members? For example, the Fifth Circuit stated, in
12 referring to the plan proponents Marathon and MRC, that "Any
13 costs the released parties might incur defending against suits
14 alleging such negligence are unlikely to swamp either of these
15 parties or the consummated reorganization." Here, this Court
16 can easily expect the proposed exculpated parties to incur
17 costs that could swamp them and the reorganization based on
18 the past litigious conduct of Mr. Dondero and his controlled
19 entities. Do these words of the Fifth Circuit hint that
20 equities/economics might sometimes justify an exculpation?

21 Second, did the Fifth Circuit's rationale for permitted
22 exculpations to Creditors' Committee and their members, which
23 was clearly policy-based, based on their implied qualified
24 immunity flowing from their duties in Section 1103 and their
25 disinterestedness, and the importance of their role in a

1 Chapter 11 case, did this rationale leave open the door to
2 sometimes permitting exculpations to other parties in a
3 particular Chapter 11 case besides Creditors' Committees and
4 their members? For example, in a situation such as the
5 Highland case, in which Independent Directors, brought in to
6 avoid a trustee, are more like a Creditors' Committee than an
7 incumbent board of directors.

8 Third, the Fifth Circuit's sole statutory basis was
9 Section 524(e). This Court would humbly submit that this is a
10 statute dealing with prepetition liability in which some
11 nondebtor is liable with the Debtor. Exculpation is a concept
12 dealing with postpetition liability.

13 The Ninth Circuit recently, in a case called *Blixseth v.*
14 *Credit Suisse*, 961 F.3d 1074 (9th Cir. 2020), approved the
15 validity of an exculpation clause incorporated into a
16 confirmed Chapter 11 plan that purported to absolve certain
17 nondebtor parties that were "closely involved" in drafting the
18 plan. They were the largest secured creditor, a purchaser,
19 and an individual who was an indirect owner of certain of the
20 debtor companies. The exculpation was from any negligence,
21 liability, for "any act or omission in connection with,
22 related to, or arising out of the Chapter 11 cases."

23 By the time the appeal was before the Ninth Circuit, the
24 only issue was the propriety of the exculpation clause as to
25 the large secured creditor, which was also a plan proponent,

1 since all the other exculpated parties had settled with the
2 appellant.

3 The Court, in determining that the exculpation clause was
4 permissible as to the secured lender, concluded that Section
5 524(e) "does not bar a narrow exculpation clause of the kind
6 here at issue -- that is, one focused on actions of various
7 participants in the plan approval process and relating only to
8 that process," Page 1082. Why? Because "Section 524(e)
9 establishes that discharge of a debt of the debtor does not
10 affect the liability of any other entity on such debt." In
11 other words, the discharge in no way affects the liability of
12 any other entity for the discharged debt. By its terms,
13 524(e) prevents a bankruptcy court from extinguishing claims
14 of creditors against nondebtors over the very discharged debt
15 through the bankruptcy proceedings.

16 The Court went on to explicitly disagree with *Pacific*
17 *Lumber* in its analysis of 524(e), reiterating that an
18 exculpation clause covers only liabilities arising from the
19 bankruptcy proceedings and not of any of the debtor's
20 discharged debt. Footnote 7, Page 1085.

21 Ultimately, the Court held that under Section 105(a),
22 which empowers a bankruptcy court to issue any order, process,
23 or judgment that is necessary or appropriate to carry out the
24 provisions of Chapter 11 and Section 1123, which establishes
25 the appropriate content of the bankruptcy plan, under these

1 sections, the bankruptcy court had authority to approve an
2 exculpation clause intended to trim subsequent litigation over
3 acts taken during the bankruptcy proceedings and so render the
4 plan viable.

5 This Court concludes that, just as the Fifth Circuit left
6 open the door for consensual exculpations and releases in
7 *Pacific Lumber*, just as it left open the door for consensual
8 exculpations and releases in *Pacific Lumber*, its dicta
9 suggests that an exculpation might be permissible if there is
10 a showing that "costs that the released parties might incur
11 defending against suits alleging such negligence are likely to
12 swamp either the Exculpated Parties or the reorganization."
13 Again, that was a quote from the Fifth Circuit.

14 If ever there were a risk of that happening in a Chapter
15 11 reorganization, it is this one. The Debtor's current CEO
16 credibly testified that Mr. Dondero has said outside the
17 courtroom that if Mr. Dondero's own pot plan does not get
18 approved, that he will "burn the place down." Here, this
19 Court can easily expect the proposed exculpated parties might
20 expect to incur costs that could swamp them and the
21 reorganization process based on the past litigious conduct of
22 Mr. Dondero and his controlled entities.

23 Additionally, this Court concludes that the Fifth
24 Circuit's rationale in *Pacific Lumber* for permitted
25 exculpations to Creditors' Committees and their members, which

1 was clearly policy-based based on their implied qualified
2 immunity flowing from Section 1103 and their importance in a
3 Chapter 11 case, leaves the door open to sometimes permitting
4 exculpations to other parties in a particular Chapter 11 case
5 besides a UCC and its members.

6 Again, if there was ever such a case, the Court believes
7 it is this one, in which Independent Directors were brought in
8 to avoid a trustee and are much more like a Creditors'
9 Committee than an incumbent board of directors. While,
10 admittedly, there are a few exculpated parties here proposed
11 beyond the independent board, such as certain employees, it
12 would appear that no one is invulnerable to a lawsuit here if
13 past is prologue in this Highland saga.

14 The Creditors' Committee was initially not keen on
15 exculpations for certain employees. However, Mr. Seery
16 credibly testified that there was a contentious arm's-length
17 negotiation over this and that he needs these employees to
18 preserve value implementing the Plan. Mr. Dondero has shown
19 no hesitancy to litigate with former employees in the past, to
20 the *nth* degree, and there is every reason to believe he would
21 again in the future, if able.

22 Finally, in this situation, in the case at bar, we would
23 appear to have a *Shoaf* reason to approve the exculpations.
24 The January 9, 2020 order of this Court, Docket Entry 339,
25 which approved the independent board and an ongoing corporate

1 governance structure for this case, and which is incorporated
2 into the Plan at Article IX.H, provided as follows: "No
3 entity may commence or pursue a claim or cause of action of
4 any kind against any Independent Director, any Independent
5 Director's agents, or any Independent Director's advisors
6 relating in any way to the Independent Director's role as an
7 Independent Director of Strand without the Court (1) first
8 determining, after notice, that such claim or cause of action
9 represents a colorable claim of willful misconduct or gross
10 negligence against Independent Director, any Independent
11 Director's agents, or any Independent Director's advisors; and
12 (2) specifically authorizing such entity to bring such a
13 claim. The Court will have sole jurisdiction to adjudicate
14 any claim for which approval of the Court to commence or
15 pursue has been granted."

16 This was both an exculpation from negligence as to the
17 Independent Directors and their agents and advisors, as well
18 as a gatekeeping provision. This Court believes that this
19 provision basically approved an exculpation for the
20 Independent Directors way back on January 9, 2020 for their
21 postpetition conduct that might be negligent. And this is the
22 law of the case and has *res judicata* preclusive effect now.

23 Thus, as to the three Independent Directors, as well as
24 the other named parties in the January 9, 2020 order, their
25 agents, their advisors, we have a situation that fits within

1 *Republic Supply v. Shoaf*, and we fit within the exception
2 articulated in *Pacific Lumber*.

3 The Court reserves the right to supplement these findings
4 and conclusions as to the exculpations, but based on the
5 foregoing, they are approved and the objections are overruled.

6 Now, turning to the Plan objection, it appears at Article
7 IX.F of the Plan and provides, in pertinent part, as follows:
8 Upon entry of the confirmation order, all enjoined parties are
9 and shall be permanently enjoined on and after the effective
10 date from taking any action to interfere with the
11 implementation or consummation of the Plan. Except as
12 expressly provided in the Plan, the confirmation order, or a
13 separate order of the Bankruptcy Court, all Enjoined Parties
14 are and shall be permanently enjoined on and after the
15 effective date, with respect to any claims and interests, from
16 directly or indirectly -- and then commencing, conducting,
17 continuing any suit, action, proceeding of any kind, and
18 numerous other acts of that vein.

19 The injunction set forth herein shall extend to and apply
20 to any act of the type set forth in any of the causes above
21 against any successors to the Debtor, including but not
22 limited to the Reorganized Debtor, the Litigation Sub-Trust,
23 and the Claimant Trust, and their respective property and
24 interests in property.

25 Plan injunctions like this are commonplace and

1 appropriate. They are entirely consistent with and
2 permissible under Bankruptcy Code Sections 1123(a)(5),
3 1123(a)(6), 1141(a) and (c), and 1142, as well as Bankruptcy
4 Rule 3016(c), which articulates the form that a plan
5 injunction must be set forth in a plan.

6 The Court finds the objections to the Plan Injunctions to
7 be unfounded, and they are thus overruled without much
8 discussion here.

9 Now, lastly, the Gatekeeper Provision. It appears at
10 Paragraph 4 of Article IX.F of the Plan and provides, in
11 pertinent part, "Subject in all respects to Article XII.D, no
12 Enjoined Party may commence or pursue a claim or cause of
13 action of any kind against any Protected Party that arose or
14 arises from or is related to the Chapter 11 case, the
15 negotiation of the Plan, the administration of the Plan, or
16 property to be distributed under the Plan, the wind-down of
17 the business of the Debtor or Reorganized Debtor, the
18 administration of the Claimant Trust or the Litigation Sub-
19 Trust, or the transactions in furtherance of the foregoing,
20 without the Bankruptcy Court (1) first determining, after
21 notice and a hearing, that such claim or cause of action
22 represents a colorable claim of any kind, including but not
23 limited to negligence, bad faith, criminal misconduct and
24 willful misconduct, fraud, or gross negligence against a
25 Protected Party; and (2) specifically authorizing such

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1 Enjoined Party to bring such claim or cause of action against
2 such Protected Party, provided, however, that the foregoing
3 will not apply to a claim or cause of action against Strand or
4 against any employee other than with respect to actions taken,
5 respectively, by Strand or any such employee from the date of
6 appointment of the Independent Directors through the effective
7 date. The Bankruptcy Court will have sole and exclusive
8 jurisdiction to determine whether a claim or cause of action
9 is colorable and, only to the extent legally permissible and
10 as provided for in Article XI, shall have jurisdiction to
11 adjudicate the underlying colorable claim or cause of action."

12 This gatekeeper provision appears necessary and reasonable
13 in light of the litigiousness of Mr. Dondero and his
14 controlled entities that has been described at length herein.
15 Provisions similar to this have been approved in this district
16 in the *Pilgrim's Pride* case and the *CHC Helicopter* case. The
17 provision is within the spirit of the Supreme Court's Barton
18 Doctrine. And it appears consistent with the notion of a pre-
19 filing injunction to deter vexatious litigants that has been
20 approved by the Fifth Circuit in such cases as *Baum v. Blue*
21 *Moon Ventures*, 513 F.3d 181, and in the *In re Carroll* case,
22 850 F.3d 811, which arose out of a bankruptcy pre-filing
23 injunction.

24 The Fifth Circuit, in fact, noted in the *Carroll* case that
25 federal courts have authority to enjoin vexatious litigants

1 under the All Writs Act, 28 U.S.C. § 1651. And additionally,
2 under the Bankruptcy Code, a bankruptcy court can issue any
3 order, including a civil contempt order, necessary or
4 appropriate to carry out the provisions of the Code, citing,
5 of course, 105 of the Bankruptcy Code.

6 The Fifth Circuit stated that, when considering whether to
7 enjoin future filings against a vexatious litigant, a
8 bankruptcy court must consider the circumstances of the case,
9 including four factors: (1) the party's history of
10 litigation; in particular, whether he has filed vexatious,
11 harassing, or duplicative lawsuits; (2) whether the party had
12 a good faith basis for pursuing the litigation, or perhaps
13 intended to harass; (3) the extent of the burden on the courts
14 and other parties resulting from the party's filings; and (4)
15 the adequacy of alternatives.

16 In the *Baum* case, the Fifth Circuit stated that the
17 traditional standards for injunctive relief -- i.e.,
18 irreparable harm and inadequate remedy at law -- do not apply
19 to the issuance of an injunction against a vexatious litigant.

20 Here, although I have not been asked to declare Mr.
21 Dondero and his affiliated entities as vexatious litigants *per*
22 *se*, it is certainly not beyond the pale to find that his long
23 history with regard to the major creditors in this case has
24 strayed into that possible realm, and thus this Court is
25 justified in approving this provision.

1 One of the Objectors' lawyers stated very eloquently in
2 closing argument, in opposing the plan injunction and
3 gatekeeping provisions, that "Even a serial killer has
4 constitutional rights," suggesting that these provisions would
5 deprive Mr. Dondero and his controlled entities of fundamental
6 rights or due process somehow. But to paraphrase the district
7 court in the *Carroll* case, no one, rich or poor, is entitled
8 to abuse the judicial process. There exists no constitutional
9 right of access to the courts to prosecute actions that are
10 frivolous or malicious. The Plan injunction and gatekeeper
11 provisions in Highland's plan simply set forth a way for this
12 Court to use its tools, its inherent powers, to avoid abuse of
13 the court system, protect the implementation of the Plan, and
14 preempt the use of judicial time that properly could be used
15 to consider the meritorious claims of other litigants.

16 Accordingly, the Objectors' objections to this provision
17 are overruled.

18 As earlier stated, this Court reserves the right to alter
19 or supplement this ruling in a written order. In this regard,
20 the Court directs Debtor's counsel -- I hope you are still
21 awake; it's been a long time -- the Court directs Debtor's
22 counsel to submit a form of order. And specifically, I assume
23 that you've already prepared or have been in the process of
24 preparing a set of findings of fact, conclusions of law, and
25 confirmation order that tracks the confirmation evidence and

1 recites conclusions of law that the Plan complies with all the
2 various provisions of Section 1123, 1129, and other applicable
3 Code provisions.

4 What I want you to do is take this bench ruling and add it
5 to what you've prepared. And what I mean is, as you can tell,
6 I've been reading: I will have my courtroom deputy email to
7 you all a copy of what I just read. I'll have her obviously
8 copy the Debtor's counsel, Creditors' Committee, Dondero and
9 the other Objectors, copy them on this written document she's
10 going to send out. And, again, I want you to kind of meld it
11 into what you've already been preparing.

12 Obviously, I did not address in this oral ruling every
13 provision of 1129(a) and (b). I did not address every 1123
14 objection. I did not even address every single objection of
15 the Objectors. But, again, any objection I've not
16 specifically addressed today is overruled.

17 The briefing, I should say, that the Debtor submitted,
18 there was a Memorandum of Law in Support of Confirmation filed
19 on January 22nd. There was also a reply brief, a hundred
20 pages or so, separately filed, replying to all the objections.
21 I don't disagree with anything that was in that. So, again,
22 to the extent you want to send me conclusions of law that are
23 along the lines of that briefing, I would consider that.

24 And so what I thought is you'll send me the melded
25 document and I will edit it if I see fit. I recognize this

1 may take a few days, so I don't give you a strict timetable,
2 just hopefully it won't take too many days.

3 All right. Is there anyone out there -- Mr. Pomerantz,
4 you had to go to jury duty, except I can't believe --

5 MR. POMERANTZ: No, I --

6 THE COURT: I can't believe you were called, but are
7 you there?

8 MR. POMERANTZ: Your Honor, I am here. I was luckily
9 excused, because I probably wouldn't have made it.

10 Your Honor, one just comment I'd make. You referred to
11 the January 9th order. You didn't refer to the CEO order,
12 which is your order July 16th, which had the same gatekeeper
13 provision. I assume that was the same analysis?

14 THE COURT: That was an oversight. Same analysis.
15 And that's exactly why I said I reserve the right to
16 supplement or amend, because I know there had to be places
17 like that where I omitted to mention something important.

18 MR. POMERANTZ: But thank you, Your Honor, for your
19 thoughtful ruling, and we will certainly incorporate your
20 materials into the order that we're working on and get it to
21 you when we can. But we appreciate it on behalf of the
22 Debtor. We know this took a lot of time and a lot of effort.
23 Hopefully, you got a chance to still watch the Super Bowl
24 yesterday.

25 THE COURT: Well, when I saw that Tom Brady was going

1 to win, I turned it off.

2 I'm sorry. That's terrible. You know, my law clerk, my
3 law clerk that you can't see, Nate, he is from Ann Arbor,
4 Michigan, University of Michigan, and he almost cried when I
5 said I didn't like Tom Brady the other day. So, I apologize.

6 MR. POMERANTZ: Your Honor, one other comment. We
7 had our motion to assume our nonresidential real property
8 lease that was also on. It got missed in all the fanfare, but
9 it was -- it has been unopposed and essentially done pursuant
10 to stipulation. So we'd like to submit an order on that as
11 well.

12 THE COURT: Okay. I have seen that, and I approve it
13 under 365. You may submit the order. Okay. Thank you.

14 MR. POMERANTZ: Thank you, Your Honor.

15 THE CLERK: All rise.

16 (Proceedings concluded at 10:35 a.m.)

17 --oo--

18

19

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 /s/ **Kathy Rehling**

02/09/2021

24

25 Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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